



## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Parts 86 and 92

#### Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972

**AGENCY:** Office of the Secretary, Department of Health and Human Services (HHS).

**ACTION:** Notification of interpretation and enforcement.

**SUMMARY:** This Notification is to inform the public that, consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity. This interpretation will guide the Office for Civil Rights (OCR) in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

**DATES:** This notification of interpretation became effective May 10, 2021.

**FOR FURTHER INFORMATION CONTACT:** Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

**SUPPLEMENTARY INFORMATION:** HHS is informing the public that, consistent with the Supreme Court’s decision in *Bostock*<sup>1</sup> and Title IX,<sup>2</sup> beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557’s<sup>3</sup> prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.

### I. Background

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<sup>1</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)

<sup>2</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* <https://www.govinfo.gov/content/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-part86.pdf>

<sup>3</sup> Section 1557 of the Patient Protection and Affordable Care Act. <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap157-subchapVI-sec18116.pdf>

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (the Department) is responsible for enforcing Section 1557 of the Affordable Care Act (Section 1557) and regulations issued under Section 1557, protecting the civil rights of individuals who access or seek to access covered health programs or activities. Section 1557 prohibits discrimination on the bases of race, color, national origin, sex, age, and disability in covered health programs or activities. 42 U.S.C. 18116(a).

On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII)’s<sup>4</sup> prohibition on employment discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. *Bostock v. Clayton County, GA*, 140 S. Ct. 1731 (2020). The *Bostock* majority concluded that the plain meaning of “because of sex” in Title VII necessarily included discrimination because of sexual orientation and gender identity. *Id.* at 1753-54.

Since *Bostock*, two federal circuits have concluded that the plain language of Title IX of the Education Amendments of 1972’s (Title IX) prohibition on sex discrimination must be read similarly. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020),<sup>5</sup> *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh’g en banc pending*, No. 18-13592 (Aug. 28, 2020).<sup>6</sup> In addition, on March 26, 2021, the Civil Rights Division of the U.S. Department of Justice issued a memorandum to Federal Agency Civil Rights Directors and General Counsel<sup>7</sup> concluding that the Supreme Court’s reasoning in *Bostock* applies to Title IX of the Education Amendments of

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<sup>4</sup> Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (41 CFR part 60-20). <https://www.govinfo.gov/content/pkg/FR-2015-01-30/pdf/2015-01422.pdf>

<sup>5</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020). <https://www.ca4.uscourts.gov/opinions/191952.P.pdf>

<sup>6</sup> *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11<sup>th</sup> Cir. 2020). <https://media.ca11.uscourts.gov/opinions/pub/files/201813592.pdf>

<sup>7</sup> March 26, 2021, the Civil Rights Division of the U.S. Department of Justice memorandum to Federal Agency Civil Rights Directors and General Counsel re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972. <https://www.justice.gov/crt/page/file/1383026/download>

1972. As made clear by the Affordable Care Act, Section 1557 prohibits discrimination “on the grounds prohibited under . . . Title IX.” 42 U.S.C. 18116(a).

Consistent with the Supreme Court’s decision in *Bostock* and Title IX, beginning today, OCR will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

In enforcing Section 1557, as stated above, OCR will comply with the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*,<sup>8</sup> and all other legal requirements. Additionally, OCR will comply with any applicable court orders that have been issued in litigation involving the Section 1557 regulations, including *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019);<sup>9</sup> *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020);<sup>10</sup> *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020);<sup>11</sup> and *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021).<sup>12</sup>

OCR applies the enforcement mechanisms provided for and available under Title IX when enforcing Section 1557’s prohibition on sex discrimination. 45 CFR 92.5(a). Title IX’s enforcement procedures can be found at 45 CFR 86.71 (adopting the procedures at 45 CFR 80.6 through 80.11 and 45 CFR part 81).

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<sup>8</sup> Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21B-sec2000bb-1.pdf>

<sup>9</sup> *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019). [https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1\\_20-cv-02834/pdf/USCOURTS-nyed-1\\_20-cv-02834-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf)

<sup>10</sup> *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020). <http://www.ca5.uscourts.gov/opinions/unpub/20/20-10093.0.pdf>

<sup>11</sup> *Asapansa-Johnson Walker v. Azar*, No. 20-CV-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020). [https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1\\_20-cv-02834/pdf/USCOURTS-nyed-1\\_20-cv-02834-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-nyed-1_20-cv-02834/pdf/USCOURTS-nyed-1_20-cv-02834-0.pdf)

<sup>12</sup> *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009 (D.N.D. Jan. 19, 2021). <https://www.hhs.gov/sites/default/files/document-124-memorandum-opinion-and-order.pdf>

If you believe that a covered entity violated your civil rights, you may file a complaint at <https://www.hhs.gov/ocr/complaints>.

Dated: May 13, 2021.

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**Xavier Becerra,**

*Secretary,*

*Department of Health and Human Services.*

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